

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-0-01**

DATE ISSUED: January 23, 1998

ISSUED TO: Griggs County State's Attorney Phyllis Ratcliffe

CITIZEN'S REQUEST FOR OPINION

On December 10, 1997, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Timothy Hill, on behalf of Griggs County Sheriff Paul Hendrickson, asking whether the Griggs County Board of Commissioners (Board) violated N.D.C.C. §§ 44-04-19 (open meetings), 44-04-19.2 (procedures for holding executive sessions), and 44-04-20 (public notice) when the Board met in executive session on November 18, 1997.

FACTS PRESENTED

The draft minutes of the November 7, 1997, regular meeting of the Board indicate that the Board would be holding a special meeting on November 18, 1997, "to hold the sale of County owned land." A special meeting was held on that date, during which the Board met in an executive session on an additional topic after passing the following motion:

The chair will entertain a Motion to hold an executive session for the purpose of consulting with its attorney regarding and in anticipation of reasonably predictable litigation relative to the matters of the investigation of the sheriff, and related matters with the former deputy sheriff; to discuss certain negotiations regarding possible litigation disclosure of which would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable litigation or on the bargaining or litigation position of the County. Such a motion requires a majority vote.

Such executive session would be held pursuant to Sections 44-04-19.1(4)(5)(6)(7) and 44-04-19.2.

The executive session lasted twenty-four minutes and was attended by all board members and the state's attorney. A tape recording of the executive session was prepared, in compliance with N.D.C.C. § 44-04-19.2(5), and has been reviewed by this office.

Although no notice of the special meeting has been retained, the Griggs County Auditor indicated there was no mention in the notice of the special meeting that an executive session would be held, and neither the state's attorney nor the editor of the county newspaper recalled any mention of the executive session in the notice. It appears the executive session was added to the agenda after the notice of the special meeting was prepared and posted.

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ISSUES

1. Was the November 18, 1997, executive session of the Board specifically authorized by law?
2. Did the Board comply with the procedural requirements in N.D.C.C. § 44-04-19.2?
3. Was sufficient public notice given of the November 18, 1997, special meeting of the Board?

ANALYSES

Issue One:

All meetings of the Board regarding county business are required to be open unless otherwise specifically provided by law. N.D. Const. art. XI, § 5; N.D.C.C. § 44-04-19. If a specific statutory exception applies, a public entity must identify that statute before closing a portion of its meeting to hold an executive session. N.D.C.C. § 44-04-19.2(2)(b). In this case, the Board's motion describes three alternate open meetings exceptions authorizing its executive session: 1) attorney consultation, 2) negotiating strategy and instruction, and 3) discussion of closed or confidential records. Only one of these exceptions needs to apply for the meeting to be properly closed.

"Attorney consultation" means "any discussion between the [Board] and its attorney in which the [Board] seeks or receives the attorney's advice" regarding and in anticipation of pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings. N.D.C.C. § 44-04-19.1(4). "Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation." Id. In addition, to qualify as "attorney consultation," a governing body of a public entity must seek or receive its attorney's advice regarding pending or reasonably predictable litigation. A simple update by the governing body's attorney on the status of pending or reasonably predictable litigation would usually not be sufficient, unless the update includes the attorney's mental impression, litigation strategy, or advice regarding the litigation.

The recording reveals that the main purpose of the executive session was to review a letter written to the state's attorney by an attorney representing the county regarding a settlement that had been reached on behalf of the county with a former deputy sheriff. The executive session consisted of a brief explanation of what had occurred up to that point regarding the settled claim, distribution of the letter and review by the Board members, and subsequent questions and discussion between the Board and the state's

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attorney on the status of the settled claim and the effect of the settlement on reasonably predictable litigation involving the investigation of the sheriff.

When the meeting was held, the Board and state's attorney could only guess at the nature of the claims and litigation that might arise out of the investigation of the sheriff because no litigation had been filed yet. However, it was reasonable for the Board to conclude that litigation involving the sheriff was predictable, and would involve many of the same facts and issues as the settled claim of the former deputy sheriff. Therefore, although the attorney consultation exception will usually not apply to advice regarding completed litigation, it is my opinion that the state's attorney's advice and responses to the Board regarding the settled claim in this instance also provided advice to the Board regarding the related, reasonably predictable litigation involving the sheriff and was authorized by N.D.C.C. § 44-04-19.1.

Issue Two:

The second issue is whether the Board complied with the procedural requirements in N.D.C.C. § 44-04-19.2, specifically the requirements that an executive session be limited to the announced topics and that any final action be taken in an open meeting.

According to the Board's motion, the purpose of the executive session was to "consult[] with its attorney regarding and in anticipation of reasonably predictable litigation relative to the matters of the investigation of the sheriff, and related matters with the former deputy sheriff." As I concluded earlier in this opinion, it was reasonable for the Board to conclude that litigation involving the sheriff was predictable, and would involve many of the same facts and issues as the settled claim of the former deputy sheriff. Because of the common facts and issues, the Board's discussion of the settlement with the former deputy sheriff was adequately covered by the topics included in the Board's motion.

In addition, there was no final action taken at the meeting. The Board reviewed and commented on a letter regarding a settlement agreement that had already been entered into by the North Dakota Insurance Reserve Fund on behalf of the county, and no further action by the Board was taken or necessary.

In conclusion, it is my opinion that the Board complied with all procedural requirements in N.D.C.C. § 44-04-19.2.

Issue Three:

The final issue is whether sufficient notice was given of the Board's November 18, 1997, meeting. For special meetings of the Board, notice must be posted and filed the same as for a regular meeting, but in addition, the county's newspaper must be notified of the meeting, including the "time, date and topics to be considered." N.D.C.C.

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§ 44-04-20(6). The topics that could properly be considered by the Board at its November 18, 1997, meeting were limited to those topics included in the notice and provided to the media. Id. This requirement applies regardless of whether the agenda topic is to be discussed in an open meeting or in executive session.

The county auditor indicated there was no mention in the meeting notice of the executive session, the editor of the county newspaper indicated to my office that she was not informed of the executive session, and an additional notice was not prepared when the executive session was added to the agenda. Therefore, it is my opinion that the notice of the meeting did not contain a material item required by law and was therefore not provided in substantial compliance with N.D.C.C. § 44-04-20.

CONCLUSION

It is my opinion that the executive session of the Board on November 18, 1997, was authorized by state law as "attorney consultation" and was held in compliance with the open meetings law and the procedures in N.D.C.C. § 44-04-19.2.

It is my further opinion that the Board complied with the procedural requirements in N.D.C.C. § 44-04-19.2.

It is my further opinion that the Board did not provide sufficient public notice of its special meeting on November 18, 1997.

STEPS NEEDED TO REMEDY VIOLATION

Only the portion of the meeting which was not included in the notice is affected by the violation. Because the public was not entitled to attend the executive session, a new meeting is not necessary to remedy the violation. The county remedied the notice violation, in effect, when it published the minutes of the special session, which contained the reason and legal basis for the executive session and the other information required in N.D.C.C. § 44-04-19.2(4).

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ATTORNEY GENERAL

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